

Malayan Banking Bhd v United Cartel Sdn Bhd

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HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24–351 OF
2004

LOW HOP BING J

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2 JUNE 2006

Land Law — Charge — Notice of demand — Defendant given seven days to remedy the breach — Whether in compliance with the words ‘such alternative period as may be specified in the charge’ — Whether chargor can accept statutory notice of less than one month — National Land Code 1965 s 254(1)(b)

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Land Law — Charge — Order for sale — Whether there exists cause to the contrary — What constitutes cause to the contrary — Default penalty interest — Whether cause to the contrary — National Land Code 1965 s 256(3)

D

In July 1999, the plaintiff offered the defendant banking facilities in the sum of RM1m, of which RM350,000 was by way of term loan while the other RM650,000 was by way of overdraft and letters of credit, bankers acceptance. The said banking facilities were accepted by the defendant and secured by way of first and second legal charges. In December 2000, the plaintiff offered the defendant further overdraft facility in the sum of RM1m with the conditions stated therein and which the defendant had accepted. It was secured by way of a third legal charge. The defendant has defaulted in the repayments and had been in breach of the terms and conditions of the above three charges. The parties herein share the common ground that in the instant application, s 256(3) of the National Land Code applies and that the court shall order the sale of the land to which the charge relates ‘unless it is satisfied of the existence of cause to the contrary’.

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Held, allowing the plaintiff’s application:

- (1) It needs to be noted that the monthly statements of account on the term loan had in fact been sent by the plaintiff to the defendant on a regular basis. If at all there have been repayments by the defendant which had really been omitted in the monthly statements of account, the defendant would no doubt have raised it with the plaintiff at the earliest opportunity as such repayments, if any, are within the specific knowledge of the defendant. As stated in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, it is for the defendant as chargor to demonstrate cause to the contrary. However, the defendant had failed to do so (see para 32).
- (2) In the instant case, cl 17.4 of the facility agreement provides for the default penalty interest of 1% pa, while cl 63 of the annexure to the first charge and

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- A cl 64 of the annexure to the second and third charges respectively contain a corresponding provision for default penalty interest of 1% pa. Applying the provisions of s 75 of the Contracts Act 1950 to the above clauses in this case, the plaintiff, being the party complaining of the breach by the defendant, is entitled as of right to receive from the defendant the penalty interest stipulated therein, whether or not the plaintiff has proved actual damage or loss (see paras 41–42).
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- (3) There was no dispute that the statutory notice served on the defendant has given the defendant seven days to remedy the breach. The question is whether the plaintiff in giving the seven-day statutory notice has complied with s 254(1)(b) of the National Land Code. It is plain and obvious that the seven-day time frame stated in the statutory notice is in complete compliance with the words ‘such alternative period as may be specified in the charge’ contained in s 254(1)(b). The case of *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96, specifically held that the aforesaid words in s 254(1) enable a chargee to impose a period of less than one month and permit a chargor to accept a statutory notice of less than one month (see paras 50, 53–54).
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[Bahasa Malaysia summary]

- E Pada Julai 1999, plaintiff menawarkan defendan kemudahan perbankan sebanyak RM1j, di mana RM350,000 adalah melalui pinjaman terma, dan baki RM650,000 adalah melalui overderaf dan surat kredit, penerimaan bank. Kemudahan perbankan tersebut diterima oleh defendan dan dijamin dengan gadaian sah yang berasingan. Pada Disember 2000, plaintiff menawarkan lagi defendan kemudahan overdraf sebanyak RM1j dengan terma-terma dinyatakan di dalamnya dan defendan menerimanya. Ia dijamin dengan gadaian sah yang ketiga. Defendan gagal membuat bayaran balik pinjaman tersebut dan memungkirkan terma-terma dan syarat-syarat ketiga-tiga gadaian di atas. Pihak-pihak bersetuju bahawa s 256(3) Kanun Tanah Negara terpakai pada permohonan di sini dan mahkamah seharusnya memerintahkan satu penjualan tanah berhubungan dengan gadaian tersebut ‘kecuali ia berpuashati terdapat kausa yang bertentangan’.
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Diputuskan, membenarkan permohonan plaintiff:

- H (1) Ia harus diperhatikan bahawa penyata akaun bulanan atas pinjaman terma sering dihantar oleh plaintiff kepada defendan. Jika terdapat sebarang pembayaran oleh defendan yang tidak diambilkira di dalam penyata akaun bulanan, defendan tentunya akan membangkitkannya dengan plaintiff seawal-awal yang dia dapat oleh kerana pembayaran balik sebegini, jika adanya, adalah di dalam pengetahuan spesifik defendan. Seperti yang dinyatakan di *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, adalah untuk defendan sebagai seorang penggadaai menunjukkan satu kausa yang bertentangan. Akan tetapi, defendan gagal berbuat demikian (lihat perenggan 32).
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- (2) Dalam kes ini, kl 17.4 perjanjian kemudahan membuat peruntukan untuk faedah penalti keingkaran 1% setahun, sementara kl 63 lampiran kepada gadaian pertama dan kl 64 lampiran kepada gadaian kedua dan ketiga masing-masing mempunyai peruntukan untuk faedah penalti keingkaran 1% setahun. Menggunakan peruntukan s 75 Akta Kontrak 1950 kepada klausa-klausa di atas dalam kes ini, plaintif sebagai pihak yang mengadu keingkaran defendan berhak secara sah untuk menerima daripada defendan faedah penalti yang dinyatakan itu, sama ada plaintif dapat membuktikan kehilangan atau kerugian sebenar (lihat perenggan 41–42). A
- (3) Tiada pertikaian berhubungan dengan notis statutori yang disampaikan kepada defendan dan memberikan defendan tujuh hari untuk membaiki kemungkiran. Soalnya ialah sama ada plaintif dalam memberikan tujuh hari notis statutori telah menurut s 254(1)(b) Kanun Tanah Negara 1965. Adalah biasa dan jelas bahawa tempoh masa tujuh hari yang dinyatakan dinotis statutori itu dipatuhi sepenuhnya dengan perkataan-perkataan ‘atau tempoh alternatif yang ditetapkan dalam caj’ yang terkandung di dalam s 254(l)(b). Kes *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96, memutuskan secara spesifik bahawa perkataan-perkataan di s 254(1) membolehkan pemegang gadaian tanah untuk mengenakan suatu tempoh yang kurang dari sebulan dan membenarkan seorang pemberi gadaian menerima satu notis statutori yang kurang daripada satu bulan (lihat perenggan 50, 53–54).] B
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Notes

For cases on notice of demand, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2032–2051.

For cases on order for sale, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2052–2157. F

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Bank Pertanian Malaysia v Zainal Abidin bin Kassim [1995] 2 MLJ 537 (refd)

Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors [2000] 4 MLJ 96 (folld) G

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] MLJ 457 (refd) H

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (folld)

Mohamad Khalid bin Farzalur Rahaman & Anor v Citibank Bhd & Anor [2000] 5 MLJ 421 (refd)

Murugappa Chettiar v Letchumanan Chettiar [1939] MLJ 296 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd) I

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)

Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd [1997] 5 MLJ 185 (refd)

- A** *Public Bank Bhd v Lee Kin Mio & Anor* [2006] 3 MLJ 47 (refd)
Syarikat Kewangan Melayu Raya v Malayan Banking Bhd [1986] 2 MLJ 253 (refd)

Legislation referred to

- B** National Land Code 1965 ss 254(1)(b), 256(3), 340
Rules of the High Court 1980 O 83 r 3(3)(a), r 3(6)
Contracts Act 1950 s 75

AB Ng (AB Ng & Associates) for the defendant.

Nurul Huda (Othman Hashim & Co) for the plaintiff.

Low Hop Bing J:

APPLICATION

- D** [1] This is the plaintiff's application by way of originating summons in encl (1) pursuant to s 256 of the National Land Code 1965 seeking an order for sale of two pieces of land held respectively under Pajakan Negeri No 9441, Lot No 6836 and Pajakan Negeri 9440 Lot 6837, both in the mukim of Batu Berendam, Melaka (collectively 'the land').

- [2] A reference hereinafter to a section is a reference to that section in the National Land Code 1965 unless otherwise stated.

FACTUAL BACKGROUND

- [3] This does not appear to be disputed.

- [4] Vide letter dated 12 July 1999, the plaintiff offered to the defendant banking facilities in the sum of RM1m, of which RM350,000 was by way of term loan at the agreed interest of 2.5% pa above the base lending rate with a monthly instalment of RM5,198 repayable over 84 months, the final payment being on or before 31 December 2005 and with a penalty interest of 1% pa while the other component of RM650,000 was by way of overdraft and letters of credit, bankers acceptance with various rates of interest stated therein (collectively 'overdraft facility').

- [5] The said banking facilities were accepted by the defendant and secured by way of first and second legal charges vide presentations No 8191/99 Jilid 654, Folio 86 and No 8192/99 Jilid 654 Folio 87 respectively.

- [6] Vide another letter dated 30 December 2000, the plaintiff offered to the defendant further overdraft facility in the sum of RM1m with the conditions stated therein and which the defendant had accepted. It was secured by way of a third legal charge vide presentation No 2276/01 Jilid 714 Folio 86.

[7] The defendant has defaulted in the repayments and had been in breach of the terms and conditions of the above three charges.

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GOVERNING PRINCIPLES

[8] The parties herein share the common ground that in the instant application, s 256(3) applies and that the court shall order the sale of the land to which the charge relates 'unless it is satisfied of the existence of cause to the contrary'.

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[9] Gopal Sri Ram JCA speaking for the Federal Court followed *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296, HC and *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] MLJ 457, PC and elaborated that the burden is on the chargor to show 'cause to the contrary' within s 256(3) which may be established only in three categories of cases viz:

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- (1) any of the exceptions to the indefeasibility doctrine in s 340;
- (2) the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and
- (3) the grant of an order for sale would be contrary to some rule of law or equity.

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[10] Defendants relied on categories (2) or (3) above and raised several issues which I shall now consider

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LOANS NOT CORRECTLY SPECIFIED

[11] Defendant's learned counsel Mr AB Ng submitted that the plaintiff's application was misconceived as the total claim was wrong and the type of loan was not specified.

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[12] Learned counsel, Ms Nurul Huda contended that the plaintiff's claim and type of loan has been clearly specified in accordance with the rules.

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[13] My perusal of the plaintiff's originating summons reveal that the plaintiff's claim against the defendant has been clearly specified, seeking an order that the land be sold by way of private treaty and/or public auction to recover:

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- (1) RM244,420.18 being the term loan facility as at 15 July 2004 together with interest at 6.5% pa together with penalty interest of 1% pa on all arrears calculated from 16 July 2004 until realisation; and
- (2) RM 1,838,996.63 being overdraft facilities as at 15 July 2004 together with interest at 2% pa above the base lending rate together with penalty interest at 1% pa calculated from 16 July 2004 until realisation.

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- A** [14] With the utmost respect, I find that the submission presented for the defendant is devoid of any merit and cannot be sustained.

RIGHT TO POSSESSION

- B** [15] It was argued for the defendant that the plaintiff failed to show the circumstances under which the plaintiff had the right to possession. Reference was made to O 83 r 3(3) and *Bank Pertanian Malaysia v Zainal Abidin bin Kassim* [1995] 2 MLJ 537

- C** [16] The plaintiff's response was that O 83 r 3(3) has been complied with.

[17] Order 83 r 3(3) merits reproduction as follows:

- D** (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:

(a) the amount of the advance;

(b) the amount of the repayments;

- E** (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge

- F** [18] In my judgment, it is to be noted that the plaintiff's originating summons has made it absolutely clear that one of the orders sought by the plaintiff is that the defendant do deliver possession of the land to the plaintiff.

- G** [19] The particulars required under O 83 r 3(3)(a)–(d) ('the statutory particulars') have been set out in para 11 of the plaintiff's first affidavit in support affirmed on 16 August 2004 specifying the state of the account between the defendant as chargor and the plaintiff as chargee.

- H** [20] Paragraph 2 of the plaintiff's second affidavit and para 13 of the plaintiff's third affidavit respectively contain all the statutory particulars, updating the state of the account between the parties herein.

[21] Paragraph 6 of the plaintiff's fourth affidavit provides all the updated statutory particulars for the term loan and the overdraft facilities.

- I** [22] Paragraph 8 of the defendant's affidavit in reply merely denied para 11 of the plaintiff's first affidavit and alleged that the plaintiff's claim was wrong, misleading, excessive and unreasonable. It was a bare denial without condescending upon particulars.

[23] There was no affidavit by the defendant to reply to para 2 of the plaintiff's second affidavit and so these statutory particulars are deemed to have been admitted by the defendant: see eg *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281.

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[24] In response to para 13 of the plaintiff's third affidavit, para 6 of the defendant's affidavit contained another bare denial which merely averred that the particulars were incomplete.

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[25] I am unable to find any affidavit in reply to the plaintiff's fourth affidavit and so as in the plaintiff's second affidavit above, the updated statutory particulars are likewise deemed to have been admitted by the defendant.

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[26] In my judgment, there can be no two views that the plaintiff has complied with O 83 r 3(3)(a) to (d) which obviously show the circumstances giving rise to the plaintiff's right to possession thereunder.

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[27] Where eg the plaintiff stated only the amount of interest and the total amount outstanding under the charge but had failed to provide the other statutory particulars viz the amount of repayments and instalments in arrears under O 83 r 3(6) as in *Zainal Abidin bin Kassim*, Hishamudin J dismissed the plaintiff's application on the ground of serious omissions.

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[28] It is to be noted that although O 83 r 3(6) regulates a claim by the plaintiff for payment of moneys secured by the charge and O 83 r 3(3) provides for delivery of possession nevertheless the statutory particulars required to be shown under O 83 r 3(3) would apply to O 83 r 3(6).

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[29] As the plaintiff herein has provided all the statutory particulars, I am constrained to reject the defendant's contention.

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ERRONEOUS CLAIM

[30] The defendant took the position that in relation to the term loan, the plaintiff's total claim was erroneous as the plaintiff's affidavits show as follows

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<u>Date of affidavit</u>	<u>Defendant's repayment (RM)</u>
16 August 2004	188,330.10 as at 15 July 2004
28 October 2005	117,934.10 as at 9 November 2005
7 December 2005	177,934.10 as at 9 December 2005

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[31] The plaintiff's contention was that the state of the account between the parties herein has to be updated from time to time, as shown in the latest affidavit and that

- A if the plaintiff's total claim had really been erroneous, the defendant would surely have been able to state the exact amount of the defendant's repayments, if any, but the defendant had failed to do so.

- B [32] In my judgment, it needs to be noted that the monthly statements of account on the term loan had in fact been sent by the plaintiff to the defendant on a regular basis. If at all there have been repayments by the defendant which had really been omitted in the monthly statements of account, the defendant would no doubt have raised it with the plaintiff at the earliest opportunity as such repayments, if any, are within the specific knowledge of the defendant. As stated in *Low Lee Lian*, it is for the defendant as chargor to demonstrate cause to the contrary. However, the had defendant failed to do so.

EXCESSIVE INTEREST

- D [33] The next issue raised for the defendant is that the plaintiff had varied the rate of interest in Form 16D ('the statutory notice') and that on the basis of s 75 of the Contracts Act 1950, the penalty interest imposed by the plaintiff was not valid, referring to:

- E (1) *Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties Bhd* [1991] 2 MLJ 283
(2) *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd* [1997] 5 MLJ 185

- F [34] It was contended for the plaintiff that the interest stated in the statutory notice was correct. Support was sought in *Syarikat Kewangan Melayu Raya v Malayan Banking Bhd* [1986] 2 MLJ 253.

- G [35] In my judgment, it is necessary to closely examine the statutory notice. I find that it has spelt out the outstanding sums due and payable by the defendants to the plaintiff as at 22 April 2004 viz RM 239,589.89 under the term loan with interest at 6.5% pa and penalty interest at 1% pa on the outstanding sum from 23 April 2004 until realisation and RM 1,791,842.44 under the overdraft facilities together with interest at 2% pa above the base lending rate and penalty interest at 1% pa on the outstanding sum until realisation together with the costs of proceedings.

- H [36] It is also pertinent to point out that prior to this originating summons, the defendant has never challenged or disputed the indebtedness stated in the statutory notice.

- I [37] Clause 24.1 of the facility agreement executed between the plaintiff as the lender and the defendant as the borrower reads:

24.1 Evidence of Indebtedness

In any proceedings relating to this agreement a statement as to any amount due to the Lender under this agreement which is certified as being correct by an officer of the Lender

shall, unless otherwise provided in this agreement, save for manifest error, be conclusive evidence that such amount is in fact due and payable.

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[38] Clause 67 of the annexure to the first charge, cl 76 of the annexure to the second and third charges respectively contain a corresponding provision as in cl 24.1 of the facility agreement.

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[39] In the circumstances, in the absence of dispute by the defendant at the first opportunity and in the absence of any manifest error, I am of the view that the content of the statutory notice shall be deemed to be conclusive: see *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and *Public Bank Bhd v Lee Kin Mio* [2006] 3 MLJ 47

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[40] Section 75 of the Contracts Act 1950 relied on by the defendant reads:

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Compensation for breach of contract where penalty stipulated for

75. Where a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of a penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

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[41] In the instant case, cl 17.4 of the facility agreement provides for the default penalty interest of 1% pa while cl 63 of the annexure to the first charge and cl 64 of the annexure to the second and third charges respectively contain a corresponding provision for default penalty interest of 1% pa.

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[42] Applying the provisions of s 75 of the Contracts Act 1950 to the above clauses in this case, the plaintiff, being the party complaining of the breach by the defendant is entitled as of right to receive from the defendant the penalty interest stipulated therein, whether or not the plaintiff has proved actual damage or loss.

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[43] I am unable to find any authority to support the defendant's contention that the penalty interest is invalid in law.

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[44] The authorities cited for the defendants need to be analysed now.

[45] The facts in *Meng Kuang Properties*, reveal that in the charge action, the chargee bank had vide Form 16D demanded the sum comprising, *inter alia*, a default interest at the rate of 20% pa and there was nothing to show that the chargee has given the requisite notice as required under cl 5 of the chargee annexure there. Hence, Lim Beng Choon J (as he then was) held that the plaintiff was not *prima facie* entitled to an order for sale.

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A [46] In *WR Low & Ng Realty*, the chargee had imposed a penalty interest when there was no provision in the charge instrument. Zainun Ali JC (now J) dismissed the chargee's foreclosure proceedings.

B [47] The facts in the above two authorities are readily distinguishable from those before me and so are unhelpful to the defendant.

TIME FRAME TO REMEDY BREACH

C [48] It was argued for the defendant that the statutory notice has given the defendant only seven days to remedy the breach when s 254(1)(b) provides for a period of one month, relying on *Mohamad Khalid bin Farzalur Rahaman & Anor v Citibank Bhd & Anor* [2000] 5 MLJ 421

D [49] The plaintiffs contention is that the judgment in *Mohamad Khalid* has been overruled by the Court of Appeal in *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96

E [50] In my judgment, it is to be noted that there was no dispute that the statutory notice served on the defendant has given the defendant seven days to remedy the breach. The question before me is whether the plaintiff in giving the seven-day statutory notice has complied with s 254(1) and para (b) thereof s 254(1)(b).

[51] The provisions regulating service of the statutory notice are contained in s 254(1)(b) which reads:

F 254 Service of default notice, and effect thereof

Where, in the case of any charge, any such breach of agreement as is mentioned in subsection (1) of s 253 has been continued for a period of at least one month or *such alternative period as may be specified, in the charge*, the chargee may serve on the chargor a notice in Form 16D:

- G** (a) ...;
- (b) requiring it to be remedied within one month of the date on which the notice is served, or such *alternative period as may be specified in the charge*; and
- (c) ... (Emphasis added.)

H [52] Clause 29 of the first charge annexure provides that in the event of any breach by the defendant, as chargor of the agreement to pay the sum due to the plaintiff as chargee for *a period of not less than seven days*, it shall be lawful for the chargee to give the statutory notice to the chargor to remedy the breach within *a period of not less than seven days*. Clause 31 of the other two charge annexures respectively contain corresponding provisions.

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[53] In my judgment, it is plain and obvious that the seven-day time frame stated in the statutory notice is in complete compliance with the words 'such alternative period as may be specified in the charge' contained in s 254(1)(b).

[54] While it is true that in *Mohamad Khalid*, cited for the defendant, Kamalanathan Ratnam J (as he then was) held that the period of breach referred to in s 254(1) should be at least one month, on appeal therefrom the Court of Appeal speaking through Gopal Sri Ram JCA in *Citibank Bhd*, specifically held that the aforesaid words in s 254(1) enable a chargee to impose a period of less than one month and permit a chargor to accept a statutory notice of less than one month. I am bound by the Court of Appeal judgment. Hence, I hold that the defendant's reliance on the High Court judgment is devoid of merits.

CONCLUSION

[55] On the foregoing grounds, I hold that the defendant has not established any cause to the contrary. I therefore make an order for sale in terms of encl (1) to realise the sum of RM2,445,735.13 outstanding on 2 June 2006 and fix the auction for 4 October 2006.

Plaintiff's application allowed.

Reported by Sally Kee

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